No. 76-447

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM G. MILLIKEN, ET AL., PETITIONERS

v.

RONALD G. BRADLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether a court may order educational changes to be made as part of the remedy for racial discrimination in the operation of the schools.

2. Whether the relief granted against the State violated the Tenth or Eleventh Amendment.

INTEREST OF THE UNITED STATES

The United States has participated in several courts during the lengthy history of this case. The United

States intervened in this case in the court of appeals [1] and participated as *amicus curiae* in this Court when the case was last here. See *Milliken* v. *Bradley*, 418 U.S. 717 (*Milliken I*).

The United States has substantial responsibility under Titles IV, VI and IX of the Civil Rights Act of 1964, 78 Stat. 248, 252, 266, 42 U.S.C. 2000c–6, 2000d and 2000h–2, and under the Equal Educational Opportunities Act of 1974, 88 Stat. 514 *et seq.*, 20 U.S.C. (Supp. V) 1701 *et seq.*, with respect to school desegregation. The Court's resolution of the issues presented in this case would affect that enforcement responsibility. The United States also contributes financially to school systems in the process of desegregation, and federal payments include support for educational programs as components of the desegregation process. See the Emergency School Aid Act, 86 Stat. 354, 357, 359, as amended, 20 U.S.C. (Supp. V) 1605(b) and 1606(a). The expenditures under this Act might be affected by the Court's disposition of this case.

For these and other reasons, the United States has participated, either as a party or as *amicus curiae*, in most of this Court's school desegregation cases, including *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294; *Cooper* v. *Aaron*, 358 U.S. 1; *Goss* v. *Board of Education*, 373 U.S. 683; *Green* v. *County School Board*, 391 U.S. 430; *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Wright* v. *Council of City of Emporia*, 407 U.S. 451; *School Board of City of Richmond* v. *State Board of Education*, 412 U.S. 92; *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189; *Norwood* v. *Harrison*, 413 U.S. 455; *Runyon* v. *McCrary*, 427 U.S. 160; *Pasadena City Board of Education* v. *Spangler*, No. 75–164, decided June 28, 1976; and *Vorchheimer* v. *School District of Philadelphia*, No. 76–37, argued February 22, 1977.

[1] This intervention was authorized by 28 U.S.C. 2403 because the constitutionality of an Act of Congress had been drawn into question. The court of appeals found it unnecessary to pass upon the constitutionality of the statute that had precipitated the intervention (see 484 F. 2d 215, 258 (*en banc*)), and the United States subsequently was dismissed as a party to this case.

STATEMENT

A. PROCEEDINGS THROUGH THIS COURT'S DECISION IN MILLIKEN I

This suit was brought in 1970 as a class action against city and state officials by parents and their children attending Detroit public schools. Plaintiffs alleged that defendants had pursued a policy and practice of racial discrimination in the Detroit public schools.

In September 1971, after several preliminary proceedings (see 433 F. 2d 897, 438 F. 2d 945), the district court found that the Detroit school board had engaged in official acts of racial discrimination that had contributed to racial separation in the school system.[2]

[2] The board had used optional attendance zones, transported children on a racially-discriminatory basis, gerrymandered attendance zones and altered grade structures, and pursued discriminatory school construction policies. 338 F. Supp. 582.

The court also found that official acts of state agencies had contributed to racial separation in the Detroit schools. The court concluded that the State of Michigan, through passage of Act 48 in 1970, had overruled Detroit's voluntary desegregation plan and thus had contributed to the problem. Cf. *Reitman* v. *Mulkey,* 387 U.S. 369. In addition, the State supervised school site selection, approved Detroit's discriminatory construction program, and denied Detroit state funds for pupil transportation that were made generally available in other parts of the State. See 338 F. Supp. 582, 589, 592, 593–594.

After considering various remedial plans submitted by plaintiffs and the Detroit Board,[3] the district court ordered the preparation of a student assignment plan that would encompass Detroit and 53 suburban school districts. See 345 F. Supp. 914. The court of appeals affirmed the findings of constitutional violations committed by both the Detroit school board and the State. See 484 F. 2d 215, 221–242. The court went on to hold that the remedy must include provisions for assigning students to schools outside the school districts in which they resided, because only such assignments could produce the racial mix the court thought to be desirable. *Id.* at 250–258.

This Court reversed in part in *Milliken I.* It did not disturb the findings that the State took part in the discrimination leading to the current conditions

[3] The court of appeals had refused to upset the order requiring the submission of plans. See 468 F. 2d 902.

in Detroit. 418 U.S. at 748. The Court held, however, that since the record contained no significant evidence of violations having an interdistrict effect, the interdistrict relief was not commensurate with the scope of the violations. The Court remanded the case for further proceedings "leading to prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." 418 U.S. at 753.

B. PROCEEDINGS ON REMAND

On remand, the district court ordered plaintiffs and the Detroit Board to submit remedial plans involving only the City of Detroit. The State defendants were ordered to submit a critique of the Detroit Board's plan (Pet. App. 13a). Hearings were held on the submitted plans, and the district court approved the Detroit Board's plan with some modifications (402 F. Supp. 1096; Pet. App. 7a–149a). It selected the Board's plan over that of plaintiffs because the Board's plan was more flexible and did not involve extensive transportation of minority students from one predominantly black school to another (Pet. App. 30a, 45a–49a, 62a). The court set out guidelines for the revision of the Board's plan to make greater use of student reassignments accomplished by rezoning and grade restructuring (Pet. App. 62a–72a).

Although plaintiffs' plan related solely to student assignment, the Detroit Board's plan included a num-

ber of "educational components." The educational components suggested were (Pet. App. 35a):

a. In-Service Training [of teachers]
b. Guidance and Counseling
c. School-Community Relations
d. Parental Involvement
e. Student Rights and Responsibilities
f. Testing
g. Accountability
h. Curriculum Design
i. Bilingual Education
j. Multi-Ethnic Curriculum
k. Co-curricular Activities.

The district court found that the proposed plan did not distinguish "between those components that are necessary to the successful implementation of a desegregation plan and those that are not" (Pet. App. 35a). It stated that, although the "Board's plan * * * includes a number of educational components intended to facilitate desegregation[,] [s]ome are unrelated to desegregation and have been inserted with the hope that they could be implemented by court order" (Pet. App. 55a).

The district court included the "educational components" in the final plan only to the extent that it found them necessary to carry out desegregation. The court concluded that "the majority of the educational components included in the Detroit Board plan are essential for a school district undergoing desegregation" and should be mandated "where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation" (Pet. App. 36a).

Expert witnesses for the Detroit Board, plaintiffs and the State had given testimony to show the need for various educational programs to bring about desegregation. Dr. Edward Simpkins, Dean of the Wayne State University College of Education, testified that educational components should be included in the desegregation plan (A. 30–31):

> I believe they should be included in the desegregation plan because the effort to desegregate has to have that going for it. The situations that were tolerable seem to become intolerable once integration becomes a part of the educational process. * * * People who don't have a program in ethnic studies are going to want to have a program in ethnic programs and studies, once they find out they have to mix with ethnic groups. * * * The fact that a counseling program, maybe there is a counseling ratio of 300—or one to 300 within a school or one to 350 which is educationally unsound, we know that. It becomes educationally intolerable generally once integration is made part of the total school program so you address yourself to, you certainly should address yourself to those educational issues that are sound and advantageous anyway whenever you take the desegregation step of the proportions that we are considering in this city * * *, there is going to be a need to address a number of educational issues that should have been addressed long before.

Dr. Simpkins also discussed the role of testing in the desegregation process (A. 31):

> In a number of school systems and certainly in the City of Detroit at one time or another we have had tracking systems built into the school systems and testing has been used as a device for segregating and isolating racial groups within schools. We know this has occurred. * * * In addressing the testing question and the review question it seems to me that the Board has attempted to insure that even if the youngster finds himself in a classroom setting that an immediate test result might indicate he belongs in, there is going to be an opportunity for review so that he is not going to be assigned to that seat, that classroom setting on any permanent basis.

Margaret Ashworth, another expert witness called by the Detroit Board, testified that in-service training of teachers was necessary because (A. 33):

> [w]hen we bring black and white children together in a classroom certain kinds of problems surface that are unlike those that existed before. Teachers have to have specific training in terms of how they will relate to those differences. In the event that black children have for the first time a white teacher, or vice versa, certain kinds of problems exist. In the first place there will be tensions, there will be hostilities, there will be resistance to the change, something that we have had experiences with and research to back up and that has to do with how one relates to differences. * * *

With respect to counseling and testing, Ashworth testified (A. 34–37):

> I am very much convinced that the present counseling and guidance program would be inadequate * * *. I am referring to counselors who have not understood the cultural differences, the racial differences, the life styles of students unlike themselves. * * * [W]hat I am saying is that students have been counseled in or out of certain programs based on their race.
>
> * * * * *
>
> We believe and it is supported by a section in the plaintiff's critique that testing is very important in the desegregation effort in that adequately trained teachers and the administration of tests play a very important part in whether or not youngsters are admitted in certain curriculums, whether or not they are tracked and particularly as it relates to placement in special education type settings.
>
> * * * * *
>
> Are you telling this Court that testing has been segregatory?
>
> A. Yes, I am.* * *
>
> Q. Would it be fair to say that the testing component in the Board's plan is designed to prevent this type of segregatory effect?
>
> A. Yes it would. * * * I believe it to be an essential part and a necessary part to make desegregation work and to correct the inequities that have come about as a result of testing practices in the Detroit Public Schools.

Dr. Michael Stolee, one of plaintiffs' experts, testified that counseling could be helpful in encouraging use by all students of programs traditionally utilized by only one race (A. 55). Dr. Gordon Foster, Director of the Miami Title IV Desegregation Center, was asked whether reading programs have been shown to be important in eliminating the lingering effects of racial discrimination. He answered (A. 56):

> Very definitely so. * * * [B]oth in our work at the center and in the funds that are requested through the Emergency School Assistance Act for the Federal Government for desegregation, the Florida District perceives this to be perhaps their highest priority item.

Finally, one of petitioners' experts, Dr. Charles Kearney of the Michigan Department of Education, testified that an in-service training program for professional staffs would prepare the staffs for desegregation. He noted that while in-service training already existed, additional training was needed to create (A. 87):

> an awareness * * * about the cultural diversity of this country, of this city * * * [T]he teacher, the professional ought to have an appreciation for those heritages and ought to be able to capitalize on kinds of differences, rather than look upon them as negative kinds of factors in dealing with children.

Dr. Kearney also testified that counseling, non-discriminatory testing, and curriculum changes are necessary to extirpate the effects of discrimination (A. 90–96).

The district court concluded (Pet. App. 36a–37a):

> In a segregated setting many techniques deny equal protection to black students, such as discriminatory testing, discriminatory counseling and discriminatory application of student discipline. In a system undergoing desegregation, teachers will require orientation and training for desegregation. Parents need to be more closely involved with the school system and properly structured programs must be devised for improving the relationship between the school and the community. We agree with the State Defendants that the following components deserve special emphasis: (1) In-Service Training; (2) Guidance and Counselling; (3) Student Rights and Responsibilities * * *; (4) School-Community Relations-Liaison; (5) Parental Involvement; (6) Curriculum Design; (7) Multi-Ethnic Curriculum; and (8) Co-Curricular Activities. Additionally, we find that a testing program, vocational education and comprehensive reading programs are essential. We find that a comprehensive reading instruction program together with appropriate remedial reading classes are essential to a successful desegregative effort.

The district court emphasized the importance of an effective reading program (Pet. App. 72a) and discussed the importance of the other educational programs to the elimination of the effects of discrimination (*id.* at 73a–83a). See also *id.* at 127a–135a. The court ordered the city and state defendants to institute comprehensive programs for reading and communication skills, in-service training, testing, and

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counselling and career guidance (*id.* at 146a). Thus, of the 11 educational components originally proposed by the Detroit Board, only three were incorporated into the court's final order, and a fourth (reading and communication skills training) was added by the court itself.

The court concluded that the cost of these four programs should be borne by both the city and State. The court ordered the Detroit Board to disclose its highest budget allocation in any year for each of the enumerated education programs already in existence. The court ordered the city defendants to provide that much money to pay for the educational components. The excess cost is to be paid equally by the Detroit Board and the state defendants (Pet. App. 146a–147a).[4]

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[4] The highest annual budget allocated for each of the four components (in effect in the 1975–1976 school year) was $75,989,000. The excess cost of complying with the district court's order was computed by the Detroit Board to be $11,645,000. Thus, under the district court's order, the state and city defendants each must contribute approximately 5.8 million dollars annually for expansion of educational programs (Pet. Br. 12–13).

The district court also found (Pet. App. 39a) that the State of Michigan does not supply the Detroit school district with as much money as it could be providing under a statute designed to aid districts that are unable to raise sufficient tax revenues (Mich. Stat. Ann. § 15.1919(525) (1975 rev.). If the district were fully funded, it would receive an additional $61,682,000; at the time of the district court's order, only 28 percent of the tax overburden section of the Act was funded by the state legislature. The court found that Detroit taxpayers have the highest municipal overburden in the state (Pet. App. 38a). It did not state whether other districts were also underfunded.

The court of appeals reversed the district court's order insofar as it adopted a student assignment plan that excluded three inner-city regions. The court affirmed the orders in all other respects (540 F. 2d 229; Pet. App. 151a–190a).

Petitioners had argued that there was no finding of constitutional violation that justified the inclusion of educational components in the plan. The court of appeals held, however, that the district court's finding that the educational components are necessary to "'remedy effects of past segregation, to assure a successful desegregation effort and to minimize the possibility of resegregation' * * * is not clearly erroneous, but to the country is supported by ample evidence" (Pet. App. 170a). The court of appeals summarized the evidence as follows (*id.* at 170a–171a):

> The need for in-service training of the educational staff and development of nondiscriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.
>
> We agree with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation.
>
> * * * * *
>
> Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish.

The court of appeals therefore held that the district court acted within its powers (Pet. App. 171a) and that the remedy was related to the violation (*id.* at 179a):

> Since Michigan State officers and agencies were guilty of acts which contributed substantially to the unlawful de jure segregation that exists in Detroit, the State has an obligation not only to eliminate the unlawful segregation but also to insure that there is no diminution in the quality of education.

The court of appeals also held that the district court properly required the State to bear part of the costs of the educational components because the order (Pet. App. 178a) "imposes no money judgment on the State of Michigan for past *de jure* segregation practices. Rather, the order is directed toward the State defendants as a part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of of *de jure* segregation."

SUMMARY OF ARGUMENT

I

The remedy in a school desegregation case "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley,* 418 U.S. 717, 746 (*Milliken I*). The goal of the remedy in a case like the present one is to eliminate the racial discrimination and all of its lingering effects. Petitioners, however, have confused the goal of the remedy with the tools available to a district court to reach that goal. The courts are not limited to undoing step-by-step the particular acts of discrimination perpetrated by the defendants.

The evidence showed that discrimination in the operation of the schools often has pervasive effects on the educational process. The district court was required to formulate a plan that would overcome these effects, and at the same time not disrupt the education of the students. The court also was required to adopt a plan addressing any new problems that would result from the process of desegregation itself. In other words, it was required to adopt a plan that would work. *Green* v. *County School Board,* 391 U.S. 430. The record in this case supports the district court's conclusion that educational programs were needed in order to make the desegregation plan work.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15. The district court therefore has the authority to require educational programs, where such programs are necessary to eradicate the lingering effects of racial discrimination and to bring about effective desegregation.

The educational components of the district court's plan in this case serve that goal. The in-service

teacher training program is designed to help faculty understand and overcome the problems of teaching in newly integrated schools and to capitalize on the diversity of the student body; the testing program is designed to detect and eradicate misleading information about individual students' capabilities that may have been generated by racial discrimination; the counseling and reading programs will help overcome educational deficiencies that can be traced, at least in part, to racial discrimination. It was, therefore, proper for the district court to require Detroit officials to comply with the educational components of the plan.

II

Petitioners' argument that the district court lacks the authority to require them to pay part of the cost of the plan is insubstantial. Both courts below found that petitioners took part in the racial discrimination in the operation of the Detroit schools, and petitioners do not challenge that finding here. That being so, the district court was authorized to provide prospective equitable relief, even though such relief may require the expenditure of money. *Edelman* v. *Jordan,* 415 U.S. 651, 664–668.

The order to pay for the equitable relief does not infringe state sovereignty. The purpose of the Fourteenth Amendment was to prevent States and their subdivisions from engaging in invidious discrimination, and it is not an invasion of their "sovereignty" to compel them to make amends for violations of that Amendment. "[N]o state law is above the Constitution" (*Milliken I, Supra,* 418 U.S. at 744), and no decision of this Court has held that judicial remedies for violations of the Constitution must yield to principles of state sovereignty. See *Fitzpatrick* v. *Bitzer,* 427 U.S. 445; *Ex parte Virginia,* 100 U.S. 339.

ARGUMENT

I

A COURT MAY ORDER EDUCATIONAL CHANGES TO BE MADE AS PART OF THE REMEDY FOR RACIAL DISCRIMINATION IN THE OPERATION OF THE SCHOOLS

A. THE REMEDY FOR RACIAL DISCRIMINATION SHOULD ELIMINATE ALL OF THE EFFECTS OF THE CONSTITUTIONAL VIOLATION

Whether the district court abused its discretion in ordering the Detroit Board to adopt (and petitioners to pay part of the cost of) certain educational programs in this case depends in large measure upon the goal the remedial order in such cases should be designed to achieve. The Court has articulated the goal in *Milliken I, supra,* 418 U.S. at 746: "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."

The goal, in other words, is to eliminate "root and branch" the violations and all of their lingering effects. *Green* v. *County School Board,* 391 U.S. 430, 438. It is to eliminate those effects whatever they may

be and wherever they may be found, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 203. The goal is not merely to adopt a plan to rearrange student assignments; it is, rather, to adopt a plan that promises "realistically to work" in overcoming the effects of discrimination. *Green, supra,* 391 U.S. at 439.

"In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown* v. *Board of Education,* 349 U.S. 294, 300. The task of an equitable decree is to correct the condition that offends the Constitution. As the Court observed in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."

Racial discrimination in the operation of the schools often has a pervasive effect on the educational process and on the hearts and minds of the students. See *Brown* v. *Board of Education,* 347 U.S. 483, 494.[5] The remedial decree should seek to alleviate these intangible effects, no less than to alleviate the assignment of students to racially identifiable schools. To this end there must be broad equitable power "to remedy past wrongs" (*Swann, supra,* 402 U.S. at 15).

[5] See also *Gilmore* v. *City of Montgomery,* 417 U.S. 556, 571; *Norwood* v. *Harrison,* 413 U.S. 455, 469.

We agree with petitioners that a court is not at liberty to produce a result merely because it may find the result desirable. The existence of a violation of the Constitution does not authorize a court to bring about conditions that never would have existed in the absence of official racial discrimination. The remedy should not be designed to eliminate arguably undesirable states of affairs that are caused by private conduct ("*de facto* segregation") or state-caused conditions not related to racial discrimination. This much has been settled by *Milliken I.* See also *Spencer* v. *Kugler,* 404 U.S. 1027, affirming 326 F. Supp. 1235 (D. N.J.);[6] *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* No. 75-616, decided January 11, 1977, slip op. 12-13 and n. 15, 17-18 and n. 21.

The task of a remedial decree in a school desegregation case "is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. * * * As with any equity case, the nature of the violation determines the scope of the remedy." *Swann, supra,* 402 U.S. at 16. Congress has made a similar judgment. In the Equal Educational Opportunities Act of 1974, 88 Stat. 516, 20 U.S.C. (Supp. V) 1712, Congress provided that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court * * * shall seek or impose

[6] In *Spencer* the Court summarily affirmed a district court's holding that extreme racial imbalance, without more, does not authorize a court to revise neutrally established school district lines.

only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

Petitioners, however, have confused the *goal* of the remedy with the *tools* available to a district court to reach that goal. They seem to contend that because the defendants did not use the lack of in-service training, for example, as part of a plan of discrimination, in-service training cannot be part of the plan to eliminate the lingering effects of the proved discrimination. This approach would unduly constrict the flexibilty of a court charged with creating a decree that will eliminate *all* of the effects of the racial discrimination.[7] Congress has provided (20 U.S.C. (Supp. V) 1703(b)) that no State may deny equal educational opportunity by failing "to take affirmative steps * * * to remove the vestiges" of discrimination. Petitioners would deny district courts the tools needed to achieve that goal.

A district court has great flexibility in crafting an equitable remedy to meet the problems presented by particular cases. It cannot be confined to ordering the defendants to undo the discrimination itself, because that often would leave the effects of the discrimination untouched. In *Green,* for example, although the unconstitutional racial discrimination was the assignment of students to one school or another on the basis of race, it was not a sufficient remedy to

[7] In a desegregation case the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154.

order the defendants to implement a "freedom of choice" plan, under which no student would be assigned on the basis of race to any school. The freedom of choice plan did nothing to overcome the lingering racial identifiability of the schools.

The principle is the same when the lingering effects of racial discrimination include deficient education received by black students in racially identifiable schools (with resulting disparities in achievement levels among students to be integrated) and the attitudes that teachers may have acquired during the many years racial discrimination was practiced by the school officials. To say that the district court is powerless to address these consequences of racial discrimination would be to say that some of the most damaging consequences of discrimination will go unattended. The mere mixture of racial groups does not constitute effective desegregation—and, indeed, may not result in a workable plan for desegregated education—if students and teachers are not given the tools necessary to overcome problems that arise in the process of desegregation.

"[W]ords are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern" (*Swann, supra,* 402 U.S. at 31). In *Swann* itself the district court's order included a requirement of in-service training of teachers and the creation of a bi-racial advisory committee to help the school system begin the process of desegregation. 318 F. Supp. 786, 802.[8] As we now show, such

[8] Petitioners err in asserting (Br. 20–21) that the Charlotte-Mecklenburg decree was limited to student assignments.

provisions in remedial decrees may be integral parts of the process of eradicating the lingering effects of discrimination. Whether or not they are properly used in particular cases rests primarily within the sound discretion of the district court; no *per se* rule forbids (or requires) their use.

B. ALTERATIONS IN THE EDUCATIONAL PROGRAM OF A SCHOOL SYSTEM UNDERGOING DESEGREGATION MAY BE NECESSARY TO ERADICATE THE LINGERING EFFECTS OF RACIAL DISCRIMINATION

The assignment of students to schools on the basis of race, the construction of schools so that they usually are or quickly become racially identifiable, and the other instruments of racial discrimination that may be found in metropolitan school systems have effects that extend far beyond the placement of students in particular schools. A remedial plan that does no more than reassign students will not eliminate whatever psychological and educational effects may have been caused by the discrimination. A simple reassignment of students might prevent psychological effects and educational deficiencies from arising in the future, but it would do nothing about the burdens imposed on the students who have suffered from racial discrimination in the past.

Nor does the mere reassignment of students provide relief that may be required for problems that result from the desegregation process itself. In at least some cases, the inclusion in a remedial plan of "educational components" similar to those at issue here will provide relief to those who have been victims of

discrimination before they leave the school system. It may, in other words, provide relief for the particular harms done to particular students, whereas the student reassignment provisions of the plan are designed to provide relief to the school system as a whole and prevent the violations from recurring.

In the event of a constitutional violation "all reasonable methods [must] be available to formulate an effective remedy." *North Carolina Board of Education* v. *Swann,* 402 U.S. 43, 46. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann, supra,* 402 U.S. at 15. No principle of equity limits the remedy to undoing, step by step, all of the acts making up the racial discrimination. Instead, courts have and must have the discretion to choose among many tools designed to bring about the elimination of the effects of the violation. Cf. *Hills* v. *Gautreaux,* 425 U.S. 284, 296–297.

Congress has determined that special educational programs often are necessary as part of a plan of desegregation, in order to eliminate the effects of racial discrimination and to address the new problems arising in the desegregation process. Title IV of the Civil Rights Act of 1964, 78 Stat. 248, as amended, 42 U.S.C. 2000c *et seq.,* authorizes the Commissioner of Education to provide information about "effective methods of coping with special educational problems occasioned by desegregation" (42 U.S.C. 2000c–2), to

provide grants for training programs "designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation" (42 U.S.C. 2000c–3), and to make grants to pay all or part of the cost of in-service training of teachers and other school personnel to deal with problems incident to desegregation (42 U.S.C. 2000c–4).

In the Emergency School Aid Act, 86 Stat. 354, as amended, 20 U.S.C. (Supp. V) 1601 *et seq.*, Congress authorized federal financial assistance

> to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools; [and] * * * to aid school children in overcoming the educational disadvantages of minority group isolation.

20 U.S.C. (Supp. V) 1601. The Act provides federal financial assistance for special remedial programs, employment of staff members trained in solving the problems incident to desegregation, the retraining of existing staff, in-service teacher education to help overcome racial stereotypes and other impediments to desegregation, comprehensive guidance and counseling for students, development of new curricula and institutional methods to instruct students of all ethnic and economic backgrounds, career education, innovative interracial programs, community activities in support of the remedial plan, administrative services to facilitate the success of the plan, planning, and remodeling of facilities. 20 U.S.C. (Supp. V) 1606(a). The Act also provides funds for "unusually promising pilot programs or projects designed to overcome the adverse effects of minority group isolation by improving the academic achievement of children in one or more minority group isolated schools * * *." 20 U.S.C. (Supp. V) 1605(b).

The courts of appeals, which have extensive experience with the problems of overcoming the continuing effects of racial discrimination, often have used or approved educational changes similar to those required by the courts below in the instant case.[9] The Fifth Circuit, which deals most often with school cases, has recognized that educational changes are integral parts of effective remedial plans. That court therefore has instructed district courts to require school officials to "provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education." *United States* v. *Jefferson County Board of Education,* 380 F. 2d

[9] See also Orfield, *How to Make Desegregation Work: The Adaptation of Schools to Their Newly Integrated Student Bodies*, 39 L. & Contemp. Prob. 314 (1975). Professor Orfield argues that teaching methods, curricula, and traditional means of grouping students should be reassessed to facilitate the process of desegregation. The author also observes that one study has shown that when curriculum changes accompanied student reassignments, many children returned to the public schools from private schools. *Id.* at 338.

385, 394 (C.A. 5) (*en banc*), certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840.

The guidelines established in *Jefferson County Board of Education* were designed to apply to all school cases within the Fifth Circuit.[10] Thus, in *Plaquemines Parish School Board* v. *United States,* 415 F. 2d 817, that court approved a plan requiring the school board to establish remedial educational programs for black students who, under the student assignment plan, would be attending formerly all-white schools. The court stated (415 F. 2d at 831):

> The remedial programs, ordered by the district court, are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged by the inequities and discrimination inherent in the dual school system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion.

The Fifth Circuit does not stand alone in using such techniques. In *United States* v. *Missouri,* 523 F. 2d 885, 887 (C.A. 8), the court required the defendants to establish in-service training programs for faculty and staff. In *Morgan* v. *Kerrigan,* 530 F. 2d 401 (C.A. 1), certiorari denied *sub nom. White* v. *Morgan,* 426 U.S.

[10] In *United States* v. *Wilcox County Board of Education*, 494 F. 2d 575 (C.A. 5), certiorari denied, 419 U.S. 1031, the court of appeals held that it was error *not* to create a countywide advisory and liaison committee. See also *Tasby* v. *Estes*, 517 F. 2d 92 (C.A. 5) (appointment of tri-ethnic committee to advise the school district).

935, the court ordered several schools to be converted to "magnet" schools and educational changes to be made in other schools; the court also appointed a committee of universities to oversee the development.[11] In *Hart* v. *Community School Board of Brooklyn,* 383 F. Supp. 699 (E.D.N.Y.), affirmed, 512 F. 2d 37 (C.A. 2), the court ordered the creation of a "magnet school" and the implementation of educational improvements.[12]

The multiplicity of methods devised by these courts demonstrates that, in fashioning remedial tools to be used against racial discrimination, the district courts are not confined to eliminating the devices that once were used as tools of discrimination.

[11] Cf. *Morgan* v. *McDonough*, 540 F. 2d 527 (C.A. 1), certiorari denied, January 10, 1977 (No. 76-664) (placing one high school in receivership and ordering educational changes to avoid frustrating desegregation); *Morgan* v. *McDonough*, C.A. 1, No. 76-1121, decided January 26, 1977 (approving certain orders concerning the receivership).

[12] Petitioners incorrectly rely (Br. 21-22) on *Keyes* v. *School District No. 1, Denver, Colorado*, 521 F. 2d 465, 480-483 (C.A. 10), certiorari denied, 423 U.S. 1066, for the proposition that educational components never may be included in a desegregation plan. The Tenth Circuit held that a district court overstepped its authority by requiring a "pervasive and detailed" (521 F. 2d at 482) plan for bilingual and bicultural education of minority children. The court disapproved the plan because it was not designed to eradicate the continuing effects of the racial discrimination and because it was an excessive intrusion into the prerogatives of local education authorities. The court did not hold, however, that no educational components could be ordered under any circumstances.

C. THE DISTRICT COURT'S PLAN IS REASONABLE

If, as we contend, and as the courts below held, a remedial plan properly may require some adjustments in the school system's educational programs, the remaining question is whether the district court abused its discretion by ordering the Detroit Board to implement the four "educational components" in this case. Both the district court and the court of appeals found that the "educational components" in the plan were necessary to ameliorate the lingering effects of official racial discrimination in the operation of the schools. This is therefore an appropriate occasion to invoke the "seasoned and wise rule of this Court [that] concurrent findings of two courts below [are] final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214. See also *Milliken I, supra,* 418 U.S. at 738 n. 18. Petitioners have not argued that the district court abused its discretion; they have argued, instead, that it has no discretion in this regard. If the Court rejects petitioners' argument that the district court is powerless to order any "educational component," that should be the end of this case.

In any event, the evidence we have recounted at pages 6–14, *supra,* supports the district court's holding that the educational components are necessary to bring to an end the continuing effects of racial discrimination in the operation of the schools and to deal with the problems resulting from desegregation. The in-service teacher training program is designed to

help faculty understand and overcome the problems of transition to a nondiscriminatory school system and to capitalize on the diversity of their students; the testing program is designed to detect and eradicate misleading information about individual students' capabilities that may have been generated by racial discrimination; the counseling program is designed to provide career and educational guidance for students whose opportunities may have been impaired by acts of racial discrimination and to inform all students of the new opportunities available to them; the reading program is designed to compensate for the educational deficiencies in the Detroit schools that may be traced, at least in part, to racial discrimination.[11]

There might be cause for concern if the district court had promulgated a plan that stripped the school board of the discretion to devise and carry out an educa-

[11] Both the district court (Pet. App. 9a, 36a, 58a, 78a, 104a, 107a) and the court of appeals (*id.* at 170a) also concluded that the educational components were justified as part of an attempt to prevent "resegregation." This apparent concern about probable stability in the anticipated racial composition of the student population is not impermissible. In choosing between otherwise permissible remedial plans, a district court does not abuse its discretion in selecting the one causing the least adverse private reaction, whether that reaction might take the form of "white flight" or, as in some cities, violent resistance. Moreover, to the extent that "resegregation" may include the reassertion, as a result of the lingering effects of past discrimination, of the racial identifiability of the schools attributable to that discrimination, it must be dealt with and overcome in any remedy designed to put the school system in the position it would have occupied but for the racial discrimination. For example, changes in the educational program of the schools may be necessary to induce white parents to send their children to schools that were formerly identifiably "black" and that may have

tional program, or if the district court unnecessarily had interfered with that authority. "School authorities are traditionally charged with broad power to formulate and implement educational policy" (*Swann, supra,* 402 U.S. at 16), and district courts ought not to assume that role in the absence of a default by local authorities—and then only to the extent necessary to rectify that default. That is all that has occurred here; the remedy at issue is specifically designed to alleviate the effects of racial discrimination in the operation of the schools.

Whenever possible, a federal court ought to avoid prescribing the details of educational policy, but the present case does not present the spectre of a district court's running the educational program of an entire school system. The "educational components" of the remedial plan here were proposed by the Detroit school board. The plan has received the full support of the Detroit officials, respondents in this Court. The district court's plan does not prescribe the day-

acquired a reputation, attributable to racial discrimination, as educationally inadequate.

Thus, there is no reason to believe that the courts below undertook to engage in the kind of exercise prohibited by *Pasadena City Board of Education* v. *Spangler*, No. 75–164, decided June 28, 1976. *Spangler* held that a district court may not reassign students annually to take account of demographic changes in student populations and shifts in racial composition of the schools not attributable to new acts of racial discrimination. Nor should the references below to resegregation be construed as requiring a particular degree of racial balance in each school or classroom. There is no indication that the courts below held, contrary to the law of the case (see *Milliken I*, *supra*, 418 U.S. at 740–741), that such racial balance must be achieved.

to-day details of administration of the educational components; rather, the plan states broad objectives, and the local school authorities are free to achieve them as they think best. We therefore submit that the district court did not abuse its discretion in ordering the implementation of the four educational components challenged by petitioners.

There remains the question whether the district court should have ordered petitioners to pay part of the cost of providing these educational components. The district court did so in light of the findings, not challenged here by petitioners, that petitioners took part in the racial discrimination. That, in our view, is a sufficient foundation for the order to pay half of the increased costs attributable to the implementation of the educational components.[14] Cf. *Griffin* v. *County School Board,* 377 U.S. 218, 233 (a federal court may order a county to levy taxes to raise funds necessary to carry out desegregation).[15]

[14] Petitioners' argument (Br. 14, 38) that the court of appeals has written a "blank check" on the state treasury is incorrect. If the costs of the educational components of the plan increase unexpectedly, petitioners could ask the district court for relief; if relief were denied, they could seek review by the court of appeals. Similarly, if the district court were to increase petitioners' proportionate contribution to the costs of the plan higher than 50 percent, petitioners could obtain appellate review. The court of appeals has approved only the plan before it.

[15] Indeed, municipalities and school boards are subdivisions of the States. Although they are not equated with the States for all purposes (see *Mt. Healthy City School District Board of Education* v. *Doyle*, No. 75–1278, decided January 11, 1977, slip op. 5–6), they exist by leave of the State, and it cannot entirely disclaim responsibility for their deeds. See *Waller* v. *Florida*, 397 U.S. 387.

II

THE DIRECTION TO PETITIONERS TO PAY PART OF THE COSTS OF THE REMEDIAL PLAN DOES NOT VIOLATE THE TENTH OR ELEVENTH AMENDMENT

Petitioners argue that, even if the district court properly ordered the Detroit Board to implement the educational components of the remedial plan, it was powerless to order the state defendants to pay any part of the cost (Br. 23–38). Petitioners do not, however, contest the holding of both the district court (338 F. Supp. at 589, 592–594), and the court of appeals (484 F. 2d at 238–241), that they took part in and fostered the acts of racial discrimination within Detroit. See also *Milliken I, supra,* 418 U.S. at 734–735 n. 16, 748 (declining to disturb the findings of state participation). Petitioners therefore are arguing, in effect, that if relief for violations of the Fourteenth Amendment will require a State to spend money, federal courts may not order relief (see Br. 26–38). The law, however, is settled to the contrary.

1. Although the Eleventh Amendment ordinarily precludes a federal court from directing a State to pay a sum of money as an accrued liabiilty (*Edelman* v. *Jordan,* 415 U.S. 651), it does not prevent a court from providing an equitable remedy for constitutional violations, even when that remedy will entail the expenditure of funds (*id.* at 664). In the present case, the expenditures required of petitioners all are incident to prospective compliance with injunctive relief, and their requirement, therefore, is not barred by the Eleventh Amendment (*id.* at 667–668).

The "direct" nature of the order to provide money does not change the result. In *Griffin* v. *County School Board,* 377 U.S. 218, 233, the Court stated that a county could be ordered to levy taxes to raise funds necessary to carry out desegregation. See also *Graham* v. *Richardson,* 403 U.S. 365, in which the Court upheld a prospective order to pay welfare benefits. *Edelman,* too, indicates that a prospective order to pay money does not offend the Eleventh Amendment.[16]

2. The Tenth Amendment, upon which petitioners rely (Br. 29–31), does not forbid enforcement of the Fourteenth Amendment. The major purpose of the Fourteenth Amendment is to prevent States from engaging in invidious discrimination. The Fourteenth

[16] The Equal Educational Opportunities Act of 1974, 88 Stat. 515, 20 U.S.C. (Supp. V) 1703(b), provides that no State may deny equal educational opportunity by "the failure of an educational agency which has formerly practiced * * * deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system." This statute was enacted in part pursuant to Congress' power under Section Five of the Fourteenth Amendment, and it applies to this case as a new law enacted during the pendency of the litigation. See *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696. Congress therefore has indicated that courts may require affirmative action to eliminate the continuing effects of racial discrimination in the operation of the schools, and the Eleventh Amendment does not forbid the award of monetary relief under a statute based upon Section Five of the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445.

Neither the district court nor the court of appeals relied upon Section 1703(b), and it is not clear to what extent they believed that the educational components of the plan were necessary to comply with this statute. The existence of such a statute demonstrates, however, that the Eleventh Amendment erects no absolute bar against the type of relief awarded in this case. See *Fitzpatrick*, *supra.*

Amendment would be feeble indeed if, as petitioners contend, the Tenth Amendment erects a shield that prevents enforcement of the Fourteenth whenever curing the racial discrimination practiced by a State requires the expenditure of money. Cf. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 308; *Ex parte Virginia,* 100 U.S. 339.

This Court has concluded in *Fitzpatrick, Virginia,* and other cases that the Fourteenth Amendment is a restriction on state sovereignty to the extent necessary to carry out its goals. See also *Mitchum* v. *Foster,* 407 U.S. 225, 238–239. Petitioners apparently argue that *National League of Cities* v. *Usery,* 426 U.S. 833, supports a contrary position, but they are wrong. "[N]o state law is above the Constitution." *Milliken I, supra,* 418 U.S. at 744. *National League* held that Congress lacks the power under the Commerce Clause to interfere with the sovereign decisions of States with respect to compensation of their employees; the Court did not rely upon the Tenth Amendment for this holding, and it did not intimate that judicial remedies for violations of the Constitution would be required to yield to principles of state sovereignty. *Fitzpatrick,* decided four days later, demonstrates that the authority of Congress and the courts to rectify violations of the Fourteenth Amendment stands unimpaired.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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